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538-983—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

CORRECTIONS OFFICER CRONRATH, PETITIONER

v.

JAMES HARVEY JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of Corrections Officer Cronrath, petitions for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Third Circuit that affirmed the denial of Cronrath's motion for summary judgment.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 488 F. 2d 820. The opinion of the district court (App. C, *infra*) is reported at 349 F. Supp. 1230.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on December 12, 1973. Mr. Justice Brennan, by orders dated March 4 and March 29, 1974, extended the time for filing a petition for a writ

of certiorari to May 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal prison guard is immune from tort suit for acts done as part of his official duties.

STATEMENT

This case involves a suit for damages by respondent Johnson, an inmate at Lewisburg Federal Penitentiary, against Warden Alldredge and Corrections Officer Cronrath for the alleged willful destruction of legal documents that belonged to respondent but were in the possession of another inmate. The defendants moved for summary judgment, asserting that their acts were immune from liability under the doctrine of executive or official immunity. Cf. *Barr* v. *Matteo*, 360 U.S. 564. The district court denied the motion (App. C, *infra*). On an interlocutory appeal, the court of appeals affirmed with respect to Officer Cronrath and reversed with respect to Warden Alldredge, holding that the latter, but not the former, had immunity (App. B, *infra*, p. 14A).

The facts relevant to the claim against Officer Cronrath, as set forth in the affidavits filed by the parties, are as follows:

Respondent gave certain legal documents and research materials to a fellow inmate, Richard Hendrickson, to help Hendrickson in preparing briefs for respondent in respondent's appeal from his conviction and in his *habeas corpus* proceeding. Although a prison regulation prohibited any inmate from keeping another inmate's legal materials in his cell with-

out prior authorization,[1] neither respondent nor Hendrickson applied for or received such authorization. While Hendrickson had respondent's legal materials, Hendrickson was placed in disciplinary segregation for reasons unrelated to this controversy. Officer Cronrath, in compliance with standing orders, cleaned out Hendrickson's cell (App. A, p. 4A).

The actual disposition of respondent's legal materials is in dispute. Respondent alleged that Officer Cronrath destroyed them, and stated in an affidavit that Officer Cronrath admitted to respondent that he had done so (C.A. App. 10, 23–24).[2] Officer Cronrath stated in his affidavit (C.A. App. 18–20) that he saw no legal papers belonging to respondent in Hendrickson's cell, and that he did not destroy any legal materials. If such materials were found, he stated, they "would have been disposed of as contraband items by other members of the custodial staff of the institution."[3] Respondent further alleged that Warden Alldredge took no disciplinary action against Offi-

[1] The regulation provides (App. C, p. 17A): "Inmate legal material is considered personal property and is contraband if found in possession of another inmate without authorization. If there are valid reasons for transfer of such material from the owner to another inmate, application should be made to the Caseworker or Liaison Officer." [Addendum to NE 2001.1, ¶ 3E, June 19, 1969].

[2] "C.A. App." refers to the Joint Appendix filed in the court of appeals.

[3] Officer Cronrath stated in his affidavit: "I made the following disposition of all of his property: All legal material whether or not identifiable as his property was placed in the above-mentioned closet in the D cellhouse area for storage, with the following entry being made by me in the D cellhouse log-book: 'Feb. 5, 1971—HENDRICKSON #35285 to Segregation. Personal property in the Officer's toilet, please do not remove

cer Cronrath, although respondent requested him to do so (C.A. App. 10–11).

Warden Alldredge stated in his affidavit that the regulation designating as contraband the legal materials of one inmate found in the possession of another inmate [4] was in force when he became warden, that he continued it in effect, and that its language was part of the standard instructions issued to correctional officers. He further stated that Officer Cronrath was subject to his supervision, control and direction and was required to carry out the policy of the prison, issued and implemented under the Warden's authority (C.A. App. 15–17).

Norman Carlson, the Director of the Federal Bureau of Prisons, stated in his affidavit (C.A. App. 33):

> The policy at the Lewisburg Penitentiary concerning the confiscation of contraband and securing of personal property of an inmate placed in segregation, as described in these affidavits, conforms to general Bureau of Prisons policy. Thus, the actions of Correctional Officer Cronrath in confiscating the legal mate-

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his legal material stored in the closet in the Officer's rest room. Don't give it to him either.'

"The reason for the last sentence of my entry was that these materials were kept by inmate Hendrickson in violation of regulations and were therefore contraband items.

"Excessive amounts of newspapers and magazines found in inmate Hendrickson's cell were confiscated and destroyed. * * *

"I have no recollection of seeing any legal papers in inmate Hendrickson's quarters, nor legal papers belonging to inmate James Harvey Johnson. Assuming that such papers were there, they would have been disposed of as contraband items by other members of the custodial staff of the institution" (C.A. App. 19–20).

[4] The regulation is quoted at fn. 1, *supra*.

> rials in inmate Hendrickson's possession under the circumstances described in Officer Cronrath's affidavit were within the scope of his official duties as a Correctional Officer at Lewisburg.

In denying cross-motions for summary judgment, the district court held that it could not determine on the record whether the defendants' acts were an "appropriate exercise of discretion" and thus whether they were entitled to immunity (App. C, p. 19A; C.A. App. 57).[5]

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[5] The district court stated: "Prison officials may not constitutionally prohibit a prisoner from assisting other prisoners in the preparation of petitions for post-conviction relief if other legal aid is lacking. However, prison regulations which reasonably limit the times, places and manner in which prisoners may prepare legal papers do not violate their constitutional rights. The prison policy statement quoted above is not on its face an unreasonable regulation of the preparation of legal papers. But it is possible that it was unreasonably applied here if Plaintiff requested the requisite permission and it was arbitrarily denied him or was granted, but ignored, when Hendrickson's property was seized. Furthermore, the policy statement says nothing about the destruction of the legal materials seized as contraband. In my view, such destruction would constitute a violation of the prisoner's constitutional rights of liberty of access to the courts unless justified by the need to maintain discipline in the prison. Such justification is not apparent from the meagre documents now before this Court. If destruction is not justified, there are questions about the culpability of the two particular defendants in this case which are also unresolved by the affidavits before the Court. Were Johnson's legal papers destroyed? If so, was it Defendant Cronrath or some other guard who destroyed them? What knowledge did the warden have that destruction of confiscated legal materials was a common practice, if it was? Because these questions of fact remain, summary judgment for any party would be improper." [App. C, pp. 17A–18A; citations and footnote omitted.]

The court of appeals ruled that under the official immunity doctrine a government official is immune from suit for actions done in the performance of his official duties only if such actions involve the exercise of "discretionary" functions. Under this test, the court held that Warden Alldredge, in continuing the policy prohibiting one inmate from possessing without permission the legal materials of another, was entitled to immunity. The court ruled, however, that although Officer Cronrath was acting within the scope of his duties, he was not immune because his actions did "not involve an exercise of judgment of the type fairly contemplated by the immunity doctrine." The court stated (App. A, p. 8A):

> Cronrath cleaned out Hendrickson's cell and, according to plaintiff's statements, destroyed the plaintiff's legal materials that had been kept by Hendrickson. It appears clearly from Cronrath's own affidavit that specific prison regulations, standing orders to the guards, and direction from superior officers controlled his actions in cleaning out the cell, removing, and, accepting plaintiff's factual statement, destroying contraband material. These routine tasks do not involve an exercise of judgment of the type fairly contemplated by the immunity doctrine. It follows that Cronrath may not rely upon the doctrine as a defense to this action and, therefore, that summary judgment based on immunity grounds was properly denied. [Footnote omitted.]

REASONS FOR GRANTING THE WRIT

This case presents an important question involving the scope of the doctrine of executive or official immunity, under which government officials are immune from suits for damages for alleged torts committed in the performance of their official duties. See *Barr* v. *Matteo,* 360 U.S. 564. The issue is whether, as the court of appeals held, such immunity exists only when the actions of the government official challenged in the suit involve an exercise of judgment or discretion, *i.e.,* where the actions constitute something more than mere compliance with and carrying out of orders and instructions. Neither *Barr* v. *Matteo, supra,* nor this Court's most recent discussion of the doctrine in *Scheuer* v. *Rhodes,* Nos. 72–914 and 72–1318, decided April 17, 1974, supports or even suggests the limitation upon the doctrine that the Third Circuit applied in this case.[6]

In *Barr,* the plurality opinion held that the acting director of an agency had an absolute immunity from liability for a defamatory press release he had issued in his official capacity. It ruled that the issuance of the release "was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively" (360 U.S. at 575; see, also, *id.* at 574). That statement, however, cannot fairly be read as indicating that the immunity is limited to situations where the official was exercising his discretion.

[6] The Second Circuit imposed a similar limitation in *Bivens* v. *Six Unknown Named Agents,* 456 F. 2d 1339.

The question whether the issuance of a press release was an appropriate exercise of Barr's discretion was significant in determining whether it was "action in the line of duty" (360 U.S. at 575). It did not relate, however, to the type of conduct the immunity covers. The Court in *Barr* certainly would not have permitted suit against the clerk in Mr. Barr's office who performed the ministerial task of publishing the defamatory statement by physically distributing it to the press, while at the same time holding that his superior who ordered the distribution was immune from suit.[7]

In the present case, the court of appeals recognized that the actions of respondent upon which this suit is founded were all done as a part of his official duties; it stated (App. A, p. 8A) that "specific prison regulations, standing orders to the guards, and direction from superior officers controlled his actions in cleaning out the cell, removing, and, accepting plaintiff's factual statement, destroying contraband material." Accordingly, the issue which led the Court in *Barr* to conclude that the action constituted an appropriate exercise of the official's discretion—the need to determine whether the official was acting within the line of duty—does not exist in this case, where the official character of respondent's actions is conceded. The court of appeals' decision, therefore, is not a mere application of the *Barr* principle to these particular

[7] See *Barr*, 360 U.S. at 575: "* * * for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."

facts, but constitutes a limitation upon that principle not contained in *Barr*.

Scheuer involved tort suits brought under the Civil Rights Act, 42 U.S.C. 1983, against the Governor of Ohio, the Adjutant General, his assistant, and various officers and enlisted members of the Ohio National Guard, and the president of Kent State University for the death of students during the disorders on the university campus in 1970. There the Court recognized that subordinate officials would be immune from liability for acts taken in good faith, even though presumably they involved no exercise of discretion. It indicated (slip op., p. 18) that the "lesser officers and enlisted personnel of the Guard" would not be liable if they "acted in good faith obedience to the orders of their superiors."

In the present case, however, the court of appeals held that the respondent prison guard would have no immunity for his actions taken pursuant to "specific prison regulations, standing orders to the guards, and direction from superior officers" (App. A, p. 8A). Although the Court in *Scheuer* held that, in the context of the civil rights suit there involved, the immunity of the officers of the executive branch of the government was only "qualified," in contrast to the absolute immunity recognized in *Barr*, the court of appeals in the present case held that the respondent prison guard had no immunity at all, either qualified or absolute.

The rationale of the executive immunity doctrine announced in *Barr*, and reaffirmed in *Scheuer*, is, we

submit, no less applicable to subordinate officials, who routinely carry out the directions of the top agency officials, than to the officials who formulate and issue the instructions. The basis of the doctrine, as announced in *Barr,* is that it is "important that officials of government should be free to exercise their duties unembarassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" (360 U.S. at 571; see, also, *Scheuer,* slip op., pp. 9–10). Subordinate government employees are just as likely to be deterred from the proper performance of their duties by the threat of personal damage suits as their superiors. A prison guard like petitioner, for example, would be reluctant to carry out quickly and effectively standing orders governing the disposition of contraband found in inmates' cells if he may be subjected to personal liability to an inmate for such action.

The doctrine of executive immunity reflects and is based upon an important public policy "designed to aid in the effective functioning of government" (*Barr, supra,* 360 U.S. at 573). The proper effectuation of that policy requires that the doctrine also apply to protect government employees of a lower rank from tort liability for actions taken in carrying out the lawful orders of their superiors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1974.

APPENDIX A

United States Court of Appeals, Third Circuit

No. 73-1177

JAMES HARVEY JOHNSON, APPELLEE

v.

WARDEN NOAH ALLREDGE AND CORRECTIONS OFFICER CRONRATH, APPELLANTS

(Argued Sept. 26, 1973—Decided Dec. 12, 1973)

SEITZ, *Chief Judge:*

Plaintiff, a federal prisoner, brought this action under 28 U.S.C. § 1331 (1970) against the prison warden, Alldredge, and a prison guard, Cronrath, seeking $35,000 damages for the alleged unconstitutional taking of his property and interference with his access to the courts. Defendants moved for dismissal and both plaintiff and defendants moved for summary judgment. In support of their motions the defendants urged, *inter alia,* that they are immune from damage liability for their official acts. The District Judge denied the motions, declaring that plaintiff had stated a cause of action for damages and that there was at least one disputed material issue of fact: "whether Defendants were acting within the outer perimeter of their authority and duties and are therefore immune from liability for the acts alleged." On defendants' motion, the District Judge amended his order to indicate that a controlling question of law existed, decision of which would advance termination of the litigation, and this Court granted defendants

leave, pursuant to 28 U.S.C. § 1292(b) (1970), to appeal from the denial of their motion for summary judgment.

[1] Before addressing ourselves to the issues raised by the parties, one preliminary matter requires our attention. In his amending order, the District Judge stated that "the controlling question of law * * * is whether destruction of a prisoner's legal materials, properly seized as contraband, is automatically within the outer perimeter of the authority and duties of prison officials or, on the other hand, is within this perimeter only if it is shown to be reasonably related to the maintenance of discipline within the prison." Were we limited to decision of this question, we have serious doubts whether review under § 1292(b) would be appropriate. These doubts are occasioned by our belief that, while an answer to the question posed by the District Court could control disposition of the litigation, the question is not one "of law as to which there is substantial ground for difference of opinion" as required by § 1292(b). The District Court's question comprehends factual as well as legal matters, requiring a factual decision as to the defendants' duties as well as a legal decision as to the relationship that official action, to be immunized, must bear to the official's duties.

The parties did not brief or argue the question set forth by the District Judge. Instead, the parties' contentions involved the availability of any immunity to defendants, the standard for determining if immunity exists, and the sufficiency of the affidavits to establish such immunity as a matter of law. We presume that the court below intended these legal questions concerning defendants' immunity, which were raised in the motion seeking certification from the District Judge, to be considered under his statement of the controlling question.

Even were this not so, we would have jurisdiction to decide the issues presented to us. 28 U.S.C. § 1292 (b) (1970) does not speak of the court of appeals deciding a question certified by the district court. Under § 1292(b) the district court is required to certify that an "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation * * *." Once the district court makes this certification, we may, in our discretion, permit appeal from the order. The district court has made the necessary certification; and we find that controlling questions of law, those briefed by the parties, exist. Since under the clear terms of § 1292(b) we are called upon not to answer the question certified but to decide an appeal, we do not find ourselves bound by the District Judge's statement of the issue. See J. Moore, Moore's Federal Practice, § 110.25[1]. In keeping with the purpose of § 1292(b) to permit decision of legal issues as to which there is considerable question without requiring the parties first to participate in a trial that may be unnecessary, we proceed to a determination of the legal issues raised by the parties. See 1958 U.S. Code Cong. & Ad.News 5255–5257.

We are concerned here only with the correctness of the District Court's denial of defendants' motion for summary judgment.[1] That denial must be affirmed if there was any material factual issue properly put in dispute by the parties. We summarize briefly the facts set forth in the affidavits, first outlining the facts not in dispute.

[1] The denial of defendants' motion to dismiss is not before us. We assume, without deciding, that plaintiff has stated a claim against the defendants unless they are immune from damage liability.

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Following his conviction for bank robbery, plaintiff filed an appeal and a petition for habeas corpus, proceeding pro se in both actions. Later he sought the aid of a fellow inmate, Richard Hendrickson, in preparing supplemental briefs for those actions and provided Hendrickson with a large quantity of legal materials. Although there was a prison regulation in force at that time prohibiting any inmate from keeping another inmate's materials in his cell without prior authorization, neither Johnson nor Hendrickson applied for or received such authorization. While Hendrickson was still in possession of plaintiff's materials, Hendrickson was placed in disciplinary segregation. Cronrath, in compliance with standing orders, cleaned out Hendrickson's cell and removed all legal materials.

A factual dispute exists concerning the disposition of the legal materials. For our purposes, plaintiff's version must be accepted. Cronrath states that he saw no materials belonging to plaintiff. Plaintiff alleges that Cronrath destroyed his materials and his affidavit further states that Cronrath admitted having done so. Warden Alldredge took no disciplinary action against Cronrath, although requested to do so by plaintiff.

Defendants do not think the dispute over the disposition of the legal papers is material. They contend that summary judgment was required because the facts demonstrate that defendants, who are federal executive officers, are being sued for actions taken with authorization in performance of their official duties and, thus, are entitled to immunity. Clearly, the dispute over disposition of plaintiff's papers is material unless defendants are immune. The District Judge concluded that a dispute also existed as to whether defendants' actions were authorized, i.e., that a factual dispute existed as to whether defendants were immune.

Plaintiff argues that the decision below was correct, but not for the reason given by the District Judge. Plaintiff argues that defendants cannot, under the facts stated in the affidavits, enjoy immunity from damage liability. In support of this argument, plaintiff advances two theories, either one of which would require affirmance here. First, he claims that executive officers have no immunity from suits alleging deprivation of constitutional rights. Second, plaintiff claims that these defendants cannot enjoy immunity because they are not officials of the type covered by executive immunity. The parties have thus joined issue on the nature and scope of the doctrine of official immunity. We turn now to consideration of that doctrine.

THE BARR DOCTRINE

In *Barr* v. *Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), the Supreme Court attempted to delineate the immunity accorded federal executive officials. *Barr* was a libel suit against the acting Director of the federal Office of Rent Stabilization. The plaintiffs, former employees of the Office of Rent Stabilization were allegedly libelled by the acting Director's issuance of a press release explaining his reasons for discharging the plaintiffs. The Supreme Court held that the Director's remarks were absolutely privileged.

[2] *Barr* established first that all executive officials are potentially covered by the immunity doctrine. Despite a passing reference to the fact that defendant Barr was an officer "of policy making rank", the plurality opinion in *Barr* makes clear that the claim of immunity is not restricted to certain specific federal officials. The four-justice plurality discussed the Court's earlier decision in *Spalding* v. *Vilas,* 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896), holding the

Postmaster General immune from suit, and noted that lower federal courts had not interpreted that decision as limited to cabinet officers. 360 U.S. at 572, 79 S.Ct. 1335. The plurality declared that official immunity "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." 360 U.S. at 572–573, 79 S.Ct. at 1340. We, thus, find merit in defendants' argument that official immunity from damage actions may extend to any federal executive official.

[3] *Barr* also makes clear that executive officials are not automatically immune from all damage suits. Both the plurality and Justice Black's concurring opinion follow the previously established law regarding executive immunity, requiring that two criteria be met before such immunity is found. First, as *Barr* makes clear, immunity protects officers from liability only for actions having a policy-making or judgmental element. This requirement has sometimes been phrased as permitting officials to enjoy immunity from liability for the exercise of "discretionary" but not "ministerial" functions.[2] It reflects the purpose for which immunity is granted to executive, as well as judicial and legislative, officers: to ensure that important decisions are made free from the fear of personal liability or harassing suits.[3]

[2] *See Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98, 11 L.Ed. 506 (1845); *Carter* v. *Carlson*, 144 U.S.App.D.C. 388, 447 F.2d 358, 361–363 (1971), rev'd on other grounds sub nom., *District of Columbia* v. *Carter*, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973); *Franklin* v. *Meredith*, 386 F.2d 958, 960–961 (10th Cir. 1971).

[3] *See Barr* v. *Matteo*, 360 U.S. 564, 571, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); *Bivens* v. *Six Unknown Named Agents*, 456 F.2d 1339, 1345–1346 (2d Cir. 1972); *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950).

The second requirement, also noted in *Barr,* is that the allegedly wrongful acts must have been "within the outer perimeter" of the defendant-official's duties. This requirement embodies the distinction drawn in *Spalding* v. *Vilas, supra,* "between action * * * in reference to matters which are manifestly or palpably beyond [the officer's] authority, and action having more or less connection with the general matters committed by law to his control or supervision."[4] A clearer manner of stating this requirement, borrowing language from the law of agency,[5] might be that, for immunity purposes, the defendant-official's authority includes any action that he reasonably believed authorized.[6]

Having identified the two prerequisites for a grant of executive immunity, we must inquire whether those prerequisites are met as to the defendants here.

APPLICATION OF BARR TO OFFICER CRONRATH

[4] The first of the two requirements set forth above is that the challenged action involve an exercise

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[4] 161 U.S. at 498, 16 S.Ct. at 637.

[5] The law of agency in fact appears to have been the original basis for official immunity, deriving from the immunity of the principal, the sovereign. *See* Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv.L.Rev. 209 (1963).

[6] The District Court in this case indicated that the test of authority for immunity purposes was whether the defendants' actions constituted "an appropriate exercise of [their] discretion." The language employed by the lower court to frame that test is taken from Justice Harlan's opinion in *Barr.* Defendants contend, we think rightly, that the District Court has taken those words out of context. Justice Harlan employed that phrase in examining the general undefined authority possessed by an agency head, attempting to ascertain whether the particular function involved, issuance of a press release, was arguably authorized under the defendant's general discretionary powers. *Barr* v. *Mattea,* 360 U.S. 564, 574–575, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

of judgment. We recognize that all or nearly all official action involves some minimal exercise of judgment. It is, however, possible to separate routine determinations, strictly controlled by statutory or administrative guidelines, from determinations arrived at by the decision-maker relatively unconstrained by specific directives.

Cronrath cleaned out Hendrickson's cell and, according to plaintiff's statements, destroyed the plaintiff's legal materials that had been kept by Hendrickson. It appears clearly from Cronrath's own affidavit that specific prison regulations, standing orders to the guards, and direction from superior officers controlled his actions in cleaning out the cell, removing and, accepting plaintiff's factual statement, destroying contraband material. These routine tasks do not involve an exercise of judgment of the type fairly contemplated by the immunity doctrine.[7] It follows that Cronrath may not rely upon the doctrine as a defense to this action and, therefore, that summary judgment based on immunity grounds was properly denied.

We note in passing that immunity from suit is only one of the protections traditionally accorded government officers. At common law, specific privileges and defenses were recognized that safeguarded officials from liability for various actions that would otherwise have constituted torts. See, e.g., *Pierson* v. *Ray,* 386 U.S. 547, 555–556, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The applicability of such other defenses is not involved in this appeal.

APPLICATION OF BARR TO WARDEN ALLDREDGE

[5] We first consider whether the challenged actions involved an exercise of judgment within the doctrinal

[7] *Cf. Bivens* v. *Six Unknown Named Agents,* 456 F. 2d 1339, 1346 (2d Cir. 1972).

meaning of these words. Warden Alldredge is charged (1) with having regulated the transfer of materials among prisoners and (2) with not disciplining Officer Cronrath. These actions were products of decisions made under a general grant of authority. The regulation of the transfer of materials embodied a decision of policy to be followed, absent amendment by the warden, at all times by all the guards and inmates at the penitentiary. It thus had those qualities of permanence and breadth characterizing policy judgments. The decision not to discipline Officer Cronrath appears adjudicatory in nature. While administrative adjudicatory decisions, reflecting the application of policy to facts, may in some instances be constrained within such narrow limits as not to merit immunity, that is not the case where, as here, the decision is made by the official responsible for setting the policy to be applied. See *Boulware* v. *Parker,* 457 F.2d 450, 452 (3d Cir. 1972).

Alldredge also satisfies the second requirement for immunity: that the actions be within the outer perimeter of his authority. Affidavits submitted by Alldredge and by his immediate superior, the Director of the Bureau of Prisons, establish that Alldredge is authorized to regulate the security and discipline of prisoners and the conduct and discipline of guards. In *Boulware* v. *Parker, supra,* we affirmed a summary judgment in favor of federal prison warden on immunity grounds. We noted that it was incumbent upon the plaintiff to file an affidavit in opposition to defendant's stating facts that would support the conclusion that defendant's actions were beyond the outer bounds of his authority.[8] Here, plaintiff's affidavit in no wise

[8] In cases where the authority of the official or the nature of the actions taken by him were unclear, we have deferred deci-

controverts the statements in Alldredge's affidavits concerning the scope of his authority. It therefore fails to create an issue as to scope of the warden's authority.

[6, 7] The foregoing analysis shows that Alldredge is entitled to the benefit of the immunity doctrine here. However, plaintiff contends that Alldredge is not so entitled because the regulation concerning possession of materials belonging to another inmate violates plaintiff's constitutional right to seek legal advice of other inmates. Without indicating any opinion as to the existence or boundaries of such a right, we note that the challenged regulation did not prohibit inmates from seeking the advice of other prisoners, but merely required permission for the transfer of materials between inmates. In any event, the constitutionality of the regulation is not relevant to the determination of defendant's authority for immunity purposes. *Cf. Kilbourn* v. *Thompson,* 103 U.S. 168, 26 L.Ed. 377 (1881); *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872); *Gregoire* v. *Biddle,* 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950). The immunity of an officer from damage liability is dependent not upon the legality of his action but upon its having sufficient connection with his duties that the officer could reasonably believe his action authorized. Alldredge's actions were clearly within his authorization.

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sions regarding immunity until further development of those facts. *E.g.*, United States ex rel. *Moore* v. *Koelzer*, 457 F.2d 892, 894 (3d Cir. 1972). Where, however, as here, such facts are clearly established by affidavits, we have disposed of the immunity issue and have not required further proceedings. *E.g.*, *Lockhart* v. *Hoenstine*, 411 F.2d 455, 460 (3d Cir.) cert. denied, 396 U.S. 941, 90 S.Ct. 378, 24 L.Ed.2d 244 (1967).

[8] Since Warden Allredge's actions are of the type entitled to immunity protection, and, as established by his affidavits without contradiction by plaintiff's, those actions were within his authority, Warden Alldredge is immune from damage liability for his actions. His motion for summary judgment should have been granted.

IMMUNITY FROM SUIT FOR VIOLATION OF CONSTITUTIONAL RIGHTS

[9] In light of our ruling respecting Warden Alldredge, we must dispose of one additional contention. Plaintiff urges us to hold that even if Alldredge is entitled to immunity under the doctrine applied in *Barr*, he is not immune from liability for the violation of constitutional rights. This contention is composed of three related arguments: (1) this action for violation of plaintiff's Fifth Amendment rights is the federal analogue of a suit against state officials under 42 U.S.C. § 1983 (1970); (2) § 1983 restricts or abrogates common law immunities; and (3) it would be anomalous for federal officials to be immune from suits alleging violation of rights for which state officers would be liable. We assume without deciding that points (1) and (3) of plaintiff's contention are correct. Point (2), however, we cannot accept.

While some courts have stated that § 1983 should be read as limiting the immunity recognized at common law,[9] this Court, sitting in banc has ruled that § 1983 does not abrogate immunities recognized at common law. *Bauers* v. *Heisel*, 361 F. 2d 581, 586–588 (3d Cir. 1965), cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18

[9] *See, e.g., Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (en banc), cert. denied sub nom., *Oswald* v. *Sostre*, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed. 2d 254 (1972).

L.Ed. 2d 457 (1967). The *Bauers* decision concerned the immunity of judicial officers to damage suits under § 1983. Adhering to the reasoning of the Supreme Court's decision in *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that state legislators were immune from § 1983 damage suits, we overruled an earlier decision of this Court and held that state prosecutors are immune from damage actions brought under § 1983. Our reasoning was that the statute creating the § 1983 right of action should not be construed to be in derogation of the common law, absent express declaration or unavoidable implication in the statute. *Id.*, 361 F. 2d at 586–588. Both majority and dissent noted that there may have been some justification for concluding that the statute had such effect, but this Court felt bound by the Supreme Court's decision in *Tenney* v. *Brandhove*. See also *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967). This panel feels similarly constrained by our decision in *Bauers* to hold that officials immune from damage suits at common law would also be immune from such suit under § 1983.

It may be suggested that this decision and our prior decision in *Boulware* v. *Parker, supra,* are in conflict with our statement in *Gaito* v. *Ellenbogen*, 425 F. 2d 845 (3d Cir. 1970), that "a state prison official, is not * * * clothed with immunity. * * *" 425 F. 2d at 849. *Gaito* involved claims by a state prisoner for habeas corpus and for § 1983 relief against the state prison warden and other officials. *Boulware,* which held a federal warden immune from damage liability was a tort suit by a federal prisoner. Reading *Gaito* and *Boulware* together, it could be argued that the distinction must be between suits under § 1983 and "ordinary" tort suits. Our decision in *Bauers* v. *Heisel*, however, negates this line of reasoning. The statement

in *Bauers* that § 1983 cannot be construed to be in derogation of common law immunities is essential to the holding in that case.

We do not believe that our *Gaito* decision contradicts what we said in *Bauers*. We note initially that *Gaito* made no explicit claim for damages, although this Court generously treated his ambiguous complaint as comprehending a claim for damages. More importantly, the statement in *Gaito* that prison officials are not immune from damage suits was not required for the disposition of that case: dismissal of the complaint against the warden for failure to state a claim. The short treatment of possible immunity for the warden may indicate that the Court did not intend to rule on the warden's immunity. Instead, the reference to his non-coverage by immunity seems designed only to distinguish the warden from the other *Gaito* defendants, all of whom were clearly immune under decisions of this Court or of the Supreme Court, to allow disposition of the complaint against the warden to rest on another ground, namely failure to state a claim.

For these reasons, we reject plaintiff's contention that the common law immunity accorded executive officers is inapplicable here.

We reverse so much of the order below as denied summary judgment to Warden Alldredge and affirm that order insofar as it denied summary judgment to Officer Cronrath.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 73-1177

JAMES HARVEY JOHNSON

v.

WARDEN NOAH ALLDREDGE, CORRECTIONS OFFICER CORMRATH, *Appellants*

(D.C. Civil Action No. 71-337)

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: SEITZ, *Chief Judge and* HUNTER and WEIS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed November 7, 1972, be, and the same is hereby reversed insofar as it denied summary judgment to Warden Alldredge, and affirmed insofar as it denied summary judgment to Officer Cronrath.

Attest:

THOMAS F. QUINN, Clerk.

DECEMBER 12, 1973.

APPENDIX C

United States District Court for the Middle District of Pennsylvania

Civil Action No. 71-337

JAMES HARVEY JOHNSON,

v.

WARDEN NOAH ALLDREDGE, CORRECTIONS OFFICER CRONRATH

OPINION

MUIR, *District Judge.*

This case presents a claim by James Harvey Johnson, an inmate at the Lewisburg federal penitentiary, that he is entitled to an award of damages in the sum of $35,000 because Defendant Cronrath, a guard at the penitentiary, allegedly seized and willfully destroyed certain legal documents and research materials belonging to Plaintiff. Plaintiff asserts that Defendant Alldredge, warden of the penitentiary at the time of the alleged seizure and destruction, failed to take action on Plaintiff's complaint concerning this matter. Presently before the Court are Defendants' motions to dismiss for lack of jurisdiction and for summary judgment, and Plaintiff's motions for summary judgment and for a jury trial.

Contrary to Defendants' assertion, this Court has jurisdiction of this action. Plaintiff claims that the defendant federal officials unreasonably infringed upon his access to the courts, a liberty which enjoys

the protection of the Due Process Clause of the Fifth and Fourteenth Amendments. *See, e.g., Burns* v. *Swenson,* 430 F.2d 771, 776 (8th Cir. 1970); *Nolan* v. *Scafati,* 430 F.2d 548 (1st Cir. 1970); *Gittlemacker* v. *Prasse,* 428 F.2d 1, 7 (3d Cir. 1970); *Stiltner* v. *Rhay,* 322 F.2d 314, 316 (9th Cir. 1963). In *Bethea* v. *Reid,* 445 F.2d 1163 (3d Cir. 1971), it was held that a complaint which alleged violations by federal officials of Fifth Amendment rights stated a federal claim upon which relief could be granted. See also *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) (seminal case; Fourth Amendment rights at issue); *Moore* v. *Koelzer,* 457 F.2d 892 (3d Cir. 1972) (dictum to the effect that the holding in *Bivens* extends to violation of any constitutional right). Since the amount in controversy here is greater than $10,000, the jurisdictional requirements of the federal question statute, 28 U.S.C. § 1331(a), are satisfied.

Plaintiff Johnson's view of the facts of this case, as stated in his complaint and an affidavit, is summarized in this paragraph. He gave the legal documents and research materials in question to a fellow inmate, one Richard Hendrickson, in order to obtain Hendrickson's assistance in preparing a brief in support of Plaintiff's appeal from his conviction and one in support of a habeas corpus petition he had filed. When Hendrickson was placed in segregation on February 5, 1971, Defendant Cronrath seized Plaintiff's legal matter and destroyed it. Defendant Cronrath admitted to Plaintiff, in the presence of other inmates, that he did so. Upon discovering this loss, Johnson complained to Warden Alldredge but obtained no satisfaction.

Cronrath in his affidavit in support of his summary judgment motion admits that he routinely secured all

property in Hendickson's cell when Hendrickson was placed in segregation, and that he placed this property, which included Hendrickson's own legal material "as well as legal writings that could not be identified as being his [Hendrickson's] property,"[1] in a prison closet for storage. He states that he does not remember seeing any legal papers belonging to Plaintiff, but that if legal papers belonging to Plaintiff were among Hendrickson's papers, "they would have been disposed of as contraband items by other members of the custodial staff of the institution."[2] The relevant policy statement in effect at the Lewisburg federal penitentiary in February, 1971, provided that:

> Inmate legal material is considered personal property and is contraband if found in possession of another inmate without authorization. If there are valid reasons for transfer of such material from the owner to another inmate, application should be made to the Caseworker or Liaison Officer. (Addendum to NE 2001.1, ¶ 3E., June 19, 1969)

No party to this case has claimed that the permission required by this policy statement was or was not obtained by Johnson prior to the transfer of his materials to Hendrickson.

Prison officials may not constitutionally prohibit a prisoner from assisting other prisoners in the preparation of petitions for post-conviction relief if other legal aid is lacking. *Johnson* v. *Avery,* 393 U.S. 483 (1969). However, prison regulations which reasonably limit the times, places and manner in which prisoners may prepare legal papers do not violate their constitutional rights. *Gittlemacker* v. *Prasse,* 428 F. 2d 1, 7 (3d Cir. 1970). The prison policy statement quoted above is not on its face an unreasonable regulation of

[1] Affidavit of Defendant Cronrath dated June 2, 1972 at p. 2.
[2] Ibid.

the preparation of legal papers. But it is possible that it was unreasonably applied here if Plaintiff requested the requisite permission and it was arbitrarily denied him or was granted, but ignored, when Hendrickson's property was seized. Furthermore, the policy statement says nothing about the destruction of the legal materials seized as contraband. In my view, such destruction would constitute a violation of the prisoner's constitutional rights of liberty of access to the courts unless justified by the need to maintain discipline in the prison. Such justification is not apparent from the meagre documents now before this Court. If destruction is not justified, there are questions about the culpability of the two particular defendants in this case which are also unresolved by the affidavits before the Court. Were Johnson's legal papers destroyed? If so, was it Defendant Cronrath or some other guard who destroyed them? What knowledge did the warden have that destruction of confiscated legal materials was a common practice, if it was?[3] Because these questions of fact remain, summary judgment for any party would be improper. Fed.R. Civ.P. 56.

It is Defendants' position that the issues just discussed need not be reached because, Defendants assert, they enjoy immunity from damage suits for acts which are within the outer perimeter of their authority and duties. They rely on the recent case of *Boulware* v. *Parker*, 457 F.2d 450 (3d Cir. 1972). In that case, it was held that the defendant warden of the

[3] Such knowledge might be a basis for holding the warden vicariously liable. See *Mills* v. *Larson*, — *F.Supp.* — (W.D. Pa. Aug. 25, 1972) (11 Cr.L. 2538); *Sanberg* v. *Daley*, 306 F.Supp. 277 (N.D. Ill. 1969); *Carter* v. *Carlson*, 447 F.2d 358, n. 39 at 370 (D.C. Cir. 1971). See also *Howell* v. *Cataldi*, 464 F.2d 272 (3d Cir. June 26, 1972).

Lewisburg federal penitentiary was immune from suit under the Federal Tort Claims Act because his conduct there was "within the outer perimeter of his authority and duties." This latter phrase has its origin in the case of *Barr* v. *Matteo,* 360 U.S. 564 (1959), upon which the Court in *Boulware* apparently relied. In *Barr,* a libel suit was instituted against the Acting Director of the Office of Rent Stabilization by former employees of that Office. The Court held that the Acting Director could maintain a defense of absolute privilege in the circumstances of that case. "The question is a close one, but we cannot say that it was not an *appropriate exercise of the discretion* with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record." *Barr,* 360 U.S. at 574 (emphasis supplied). As discussed above in relation to the summary judgment motions before the Court, the present record is inconclusive as to the particular facts of this case and their general context. Since on the basis of Plaintiff's complaint and affidavit it could reasonably be concluded that Defendants' acts were not an "appropriate exercise of the discretion" which they have as prison officials, their claim of immunity cannot be sustained at this time. The present state of the record also precludes granting summary judgment based on the defense of Defendants' good faith performance of their duties.[4]

Remaining for resolution at the present time is the issue of whether Plaintiff has a right to have his claim for damages tried by a jury. In my view, the Seventh Amendment guarantees him this right. It provides that "[i]n suits at common law * * * the right of trial by

[4] On this defense, *see, e.g.,* Pierson v. Ray, 386 U.S. 547, 557 (1967); *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339, 1347–1348 (2d Cir. 1972).

jury shall be preserved." This language has been interpreted to mean that litigants have a right to jury trial—

> not merely [in] suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered * * *. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.' *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830)." *Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970).

Plaintiff's claim is a legal one because it is one for damages, because its closest common-law analogue is a tort action for trespass,[5] and because a jury is fully capable of comprehending the issues such a claim presents. See *Ross* v. *Bernhard*, 396 U.S. 531, n. 10 at 538; n. 1 at 543 (Stewart, J., dissenting). Presumably on the basis of a similar, although unarticulated, rationale, several courts have held that there is a right to a jury trial in an action for damages under the Civil Rights Act. *Henderson* v. *Goeke*, 329 F.Supp. 1160, n. 5 at 1162 (E.D. Pa. 1971); Wilson v. Prasse, 325 F.Supp. 9, 14 (W.D. Pa. 1971); *Turner* v. *Fouche*, 290 F.Supp. 648, 652 (S.D. Ga. 1968).

An Order in accordance with this Opinion denying Defendants' motions and Plaintiff's motion for summary judgment and setting the case for trial by jury will be entered.

MUIR,
United States District Judge.

Dated: NOVEMBER 7, 1972.

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[5] Civil Rights Actions are read against a background of tort liability. *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961).

APPENDIX D

United States District Court for the Middle District of Pennsylvania

Civil Action No. 71-337

JAMES HARVEY JOHNSON, PLAINTIFF

v.

WARDEN NOAH ALLDREDGE, CORRECTIONS OFFICER CRONRATH, DEFENDANTS

ORDER

In accordance with the Opinion filed today, Defendants' motions to dismiss for lack of jurisdiction and for summary judgment are denied. Plaintiff's motion for summary judgment is denied. Plaintiff's motion for a jury trial is granted.

MUIR,
United States District Judge.

Dated: NOVEMBER 7, 1972.

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